

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

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HONORABLE VIRGINIA A. PHILLIPS, JUDGE PRESIDING

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REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

Riverside, California

Monday, April 29, 2013

2:51 p.m.

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1 MONDAY, APRIL 29, 2013; RIVERSIDE, CALIFORNIA

2 -00o-

3 THE CLERK: Item No. 9, 12-092(A) VAP, United States
4 of America v. Sohiel Omar Kabir, Ralph Kenneth DeLeon and
5 Miguel Alejandro Vidriales Santana.

02:51

6 Counsel, please state your appearance.

7 MS. DEWITT: Good afternoon, Your Honor. Susan
8 DeWitt on behalf of the Government.

9 MR. GRIGG: Good afternoon, Your Honor. Chris Grigg
10 for the Government.

02:51

11 THE COURT: Thank you. Good afternoon.

12 MR. AARON: Jeffrey Aaron for the Federal Public
13 Defender for Mr. Sohiel Kabir.

14 MR. LARSEN: Matthew Larsen also for the Federal
15 Defender's office for Mr. Kabir.

02:52

16 MS. VIRAMONTES: Angela Viramontes on behalf of
17 Sohiel Kabir.

18 THE COURT: Thank you.

19 MR. DRIGGS: Randy Driggs, Your Honor, on behalf of
20 Ralph DeLeon who is present in custody.

02:52

21 THE COURT: Thank you.

22 MR. SCOTT: Rob Scott for Mr. Santana, Your Honor,
23 who is present in custody.

24 THE COURT: All right. Thank you.

25 There are a number of motions on calendar in this

02:52

1 matter. I've prepared a written -- and the clerk has
2 distributed -- a written tentative on the Motion to Dismiss.
3 And before I get to the other motions, does either side wish to
4 be heard on that?

5 MR. LARSEN: Your Honor, we'll submit on the papers. 02:52

6 THE COURT: All right. Let's take up the other
7 motions.

8 First, the motion to unseal, which is found at Docket
9 No. 93. Both sides -- maybe I should say "all sides" because
10 there is more than one defendant, but there have been a number
11 of sealed filings. I review -- every time a party seeks to
12 file something under seal, I carefully review the affidavit
13 because I don't always grant them. And I followed that
14 procedure in connection with this case, just like any other
15 case. There was good cause, at the time, that all of these
16 documents that are mentioned in the motion were filed under
17 seal. Almost all of them, the sealing order was signed by me.
18 There was one, I think, that was signed by the magistrate judge
19 before the case was assigned to me.

20 After reviewing the motion, I went through and 02:53
21 reviewed each one of these again and found that my initial
22 sealing order was appropriate. But I'll further say that as to
23 documents -- the documents found at Docket Nos. 25 and 27,
24 those documents have already been provided to the defendant.
25 And so far as the motion addresses Document No. 2, those 02:54

1 documents have been unsealed.

2 Without revealing the contents of what I previously
3 ordered sealed, I will just say, in general, that it is not
4 uncommon in any criminal proceeding for a defendant to seek
5 approval of outside services, and those are commonly -- or
6 almost always, as far as I know -- filed under seal. Many of
7 the documents that this motion seeks to have unsealed were not
8 documents filed by the Government. But again, as I said, I
9 reviewed each and every sealing order, and there is no good
10 cause at this time to unseal any of them.

02:54

02:55

11 So I intend to deny that motion.

12 As to the motion for disclosure -- well, let me take
13 up ones I think are -- well, as to the Motion for Disclosure of
14 Government's Witness List, the Government -- which is at Docket
15 No. 92 -- the Government's response, in part, is that it
16 doesn't intend to call any witnesses who are located in Germany
17 or Afghanistan, or who are UN employees.

02:55

18 That doesn't entirely resolve the motion, but it
19 does, in terms of the timing of when the witness list will be
20 -- when I'll order them to be exchanged and disclosed, that
21 does allay the concern that would be necessary to travel to
22 investigate the Government's witnesses, if they are located in
23 Germany, Afghanistan, et cetera.

02:55

24 The Motion for Discovery of the Government's Key
25 Documents and Conversations, which is Docket No. 95, as best I

02:56

1 can tell in this motion, the defense seems to be asking that
2 the Government designate -- among the documents that it
3 produces or has produced -- which ones fall into the category
4 of *Jencks* material, which ones are *Brady* material, which ones
5 would be categorized as relating to 404(b) issues, et cetera.

02:56

6 There is no basis for that motion at this point, and
7 I would deny it.

8 The Motion For Disclosure of Confidential Source
9 Information, Docket No. 94, I will set up, you know, some
10 future dates, but at this point I think that the motion is
11 premature. The Government indicates it hasn't decided whether
12 it's even going to call the confidential source as a witness,
13 and it has already provided information regarding payments,
14 criminal history, and immigration benefits. The Government --
15 and we may need to revisit that later, but not at this point.

02:56

16 The Motion to Provide Unredacted Discovery, which is
17 Docket No. 98, according to the Government, at least as of the
18 time it filed its opposition, it has so far produced 2500 pages
19 of discovery, roughly, more than 60 CDs and DVDs of audio and
20 video recording, seven CDs and DVDs of digital device data and
21 pull camera footage. And when it did so -- I think it was at
22 the time that it disclosed that the -- there were information
23 given identifying the date of each recording contained therein.

02:57

24 It does -- some of the examples that the defense gave
25 of material, which has been so heavily redacted that it is of

02:57

1 no use to them, I'll hear argument about that point.

2 The Motion For Discovery, which is Document No. 97,
3 to the extent that it seeks plea agreements, if there are or in
4 the future are any plea agreements, as I said, you know -- and
5 the documents regarding the circumstances of Mr. Kabir's
6 arrest -- I would deny the motion as to those. 02:58

7 The defendant -- I mean, to the extent that the
8 defendant may have or believe he has a Bivens action for
9 excessive force because of his treatment at the time of the
10 arrest, that's entirely a separate issue from this lawsuit. 02:58

11 The defense argues that the information regarding the
12 circumstances of his arrest, his medical treatment, and so
13 forth, are relevant because his injuries may have influenced
14 his ability to understand his rights in order to knowingly
15 waive them and to communicate with Government agents. 02:59

16 So with respect to medical treatment, I might allow
17 or order that to be turned over, if there was any medical
18 treatment given. So I'll hear argument on that.

19 And again, as to the identity of the informant, the
20 Court eventually -- again, I think it's premature, but 02:59
21 eventually, if the Government is going to call that person as a
22 witness, or perhaps even if the Government does not, the Court
23 has to consider a number of factors. Taking -- under the
24 Roviaro case, the Supreme Court said ...*taking into*
25 *consideration the crime charged, possible defenses, and* 02:59

1 possible significance of the informer's testimony.

2 But again, here we don't even know if there is going
3 to be testimony. So I can't really address that at this time.

4 The parties seem to be under -- well, the Government
5 seems to be under a misapprehension of what was said at the
6 last hearing because I did not intend to communicate -- and I
7 don't believe I did communicate -- that I was setting a
8 tentative trial date; it was not a tentative trial date.

9 The Government argued fiercely that the trial date
10 that the Court set was unrealistic and, apparently, in the
11 minds of Government counsel, it was tentative. But it was not.

12 Now, both sides seem to be in agreement on just one
13 thing here, which is that the current trial date of August
14 the 6th and the pretrial conference date are such that the
15 defense could not be ready to proceed. And I think the
16 Government's position is, more or less, that they could not --
17 they would not be ready to proceed, either, because of the
18 number of documents and so forth that have to be turned over in
19 discovery eventually.

20 Moving the trial date -- which I think we should
21 start with that, if counsel want to argue for that -- would
22 pose a number of problems, and that's why I gave notice to
23 counsel that it was not a tentative trial date. It was the
24 trial date.

25 I have a complex -- I have three complex criminal

03:00

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03:01

03:01

1 trials set: This case, a complex case set for September 17th,
2 and another one set for October 29th. I have reason to believe
3 that both of those other cases at least some of the defendants
4 are going to go to trial. So it's not an issue here whether I
5 could continue the case for a month, because this case would
6 then bump into the case I have set for September 17th.

03:01

7 So I will listen to argument from counsel about the
8 trial date, and then I intend to set dates for designation of
9 experts, a preliminary witness list, transcripts of any
10 recordings that the Government intends to use in its
11 case-in-chief, information about the confidential source, if
12 appropriate, and we can discuss that. But first, I think we
13 should discuss -- or counsel can discuss with me their concerns
14 regarding the trial date.

03:02

15 Ms. DeWitt?

03:02

16 MS. DEWITT: Your Honor, could I have a chance to
17 talk to counsel for a second just to confer with them about a
18 trial date? Because --

19 THE COURT: Well, that brings up the other point.

20 Counsel -- defense counsel, in the reply on these
21 motions, said that there is no requirement under the -- my
22 standing order, the Federal Rules of Criminal Procedure, the
23 local rules to meet and confer before motions are filed, which
24 is technically accurate, but it does seem to me that there
25 should have been a better communication between counsel because

03:03

1 at least some of these issues could have been resolved.

2 So I hope in the future that motions that are
3 presented in this case will only be about things that counsel,
4 in good faith, could not resolve ahead of time.

5 But go ahead and take a moment to discuss the trial
6 date with Mr. Aaron, if you like. 03:03

7 (Counsel conferring.)

8 THE COURT: All right. Ms. DeWitt?

9 MS. DEWITT: Your Honor, having conferred with
10 counsel for each of the defendants, what we would like to
11 propose is a date in early 2014 that is -- that works with the
12 Court's calendar because I think that will allow everybody
13 sufficient time to work through these issues, as well as
14 pretrial motions, and will not conflict with your current
15 complex, other complex cases, I'm hoping. I know you have many
16 other things on your calendar, as well, but I think if we put
17 it out that far -- and I know that's a little bit farther than
18 the Court normally would like to do -- 03:04

19 THE COURT: Well, normally, I don't grant
20 continuances. 03:05

21 MS. DEWITT: I understand.

22 THE COURT: All right.

23 MS. DEWITT: I understand. And I would hope that
24 because of the unusual nature of this case that we could do
25 that, because I think it's in everyone's interest -- everyone 03:05

1 -- all the parties' interest and, hopefully, it will also inure
2 to the Court's benefit, as well.

3 THE COURT: Mr. Aaron?

4 MR. AARON: That's correct, Your Honor.

5 Your Honor, I will get into this, if the Court will 03:05
6 allow argument on some of the discovery issues, because I think
7 that a certain amount of discovery and investigation, at least
8 from the defense perspective, needs to be done in at least one
9 of two foreign countries; that is, Afghanistan.

10 We think that, to the best that we can assure the 03:05
11 Court at this point, if the Government will be able to fulfill
12 its discovery obligations by early 2014, the defense will be
13 able to get the material and to investigate it.

14 THE COURT: Well, if you're proposing a trial date in
15 January of 2014 -- 03:05

16 MR. AARON: I was thinking more like February, March,
17 early in the year, but I understand.

18 THE COURT: All right.

19 MR. AARON: Of course, any additional time is good.

20 And from the defense perspective, since we don't know 03:06
21 when we're going to get this discovery and we don't know what
22 that discovery will consist of, and we don't know -- simply
23 because the Government says, *I'm going to be calling a United*
24 *States national witness and here he is*, the witnesses who may
25 impeach him from the defense perspective may live in 03:06

1 Afghanistan, and that may require us to spend more time to get
2 an interview and obtain the attendance of that witness than it
3 would be for the Government just to call the American national
4 witness.

5 So that would take more time. 03:06

6 We think that, given the fact that all parties are
7 trying to work to resolve those issues, early in 2014 would be
8 best.

9 THE COURT: Well, I was going to suggest a trial date
10 of November the 19th, assuming that there is good cause for any
11 continuance, which would move the pretrial conference date to
12 November the -- probably have it more than a week ahead of
13 time, but probably set the pretrial conference on something
14 like November the 4th. 03:06

15 It's the parties' positions that that would not give
16 the defense -- well, that that would not give the Government
17 enough time to comply with all the discovery responsibilities,
18 and the defense not enough time to prepare for trial. 03:07

19 MS. DEWITT: Your Honor, we will continue to do our
20 best to produce discovery as quickly as we can. So I think
21 that this is in an abundance of caution. I mean, the concern
22 is for the defense. And I don't want the defense to be able to
23 claim, at the end of the day, that they did not have adequate
24 time to prepare due to the time that it's taking us to produce
25 discovery. So I guess my recommendation would be to error on 03:07

1 the side of a later trial date.

2 But if the Court sets those dates, we will do the
3 best we can with the Court's dates.

4 THE COURT: All right. I'll come back to the date,
5 then. 03:08

6 I will grant the request for a continuance from the
7 current trial date, which is in August.

8 So let's move on to discussion of the other motions.

9 MR. AARON: Your Honor, I don't mean to try the
10 Court's patience, but there is an important -- 03:08

11 THE COURT: You haven't come close yet today.

12 MR. AARON: Today. Thank you.

13 THE COURT: But I'll let you know.

14 MR. AARON: The Government has some problems
15 getting -- I believe getting information from Washington, or
16 from other agencies because of the security issues. That's
17 delaying, to the best I understand it, that's delaying some of
18 the defenses' access to materials. We don't know how much
19 that's going to delay the information in the future. So when
20 the Court considers a trial date, it might be useful to bear
21 that in mind. 03:08

22 In terms of the other motions, I'm prepared to
23 address all the other discovery motions now, if the Court
24 wishes.

25 THE COURT: And what I think the parties -- well, and 03:09

1 particularly the defense -- should focus on is the issue with
2 the redacted materials.

3 But go ahead.

4 MR. AARON: I will get to that motion, Your Honor,
5 but I would like to say just a couple of words about some of
6 the other motions. For example, the witness list. 03:09

7 Your Honor, I understand that the prosecution at this
8 point says it's not going to call the confidential informant.

9 THE COURT: I think it said it hadn't made a
10 decision. 03:09

11 MR. AARON: That being the case, it's more crucial
12 than ever that we get the information regarding their witness
13 list and the information about the confidential informant. I
14 would point out that we've received some 270 hours of
15 conversations involving the confidential source over some 63 03:09
16 DVDs or CDs, whatever. Many of those conversations involve
17 Arabic sprinkled throughout, whether in longer passages or
18 short remarks, when the informant is speaking to another person
19 we believe not a law enforcement person, but we don't know that
20 for sure. Just to find -- and we haven't even been able to
21 find an expert yet who would be able to spend 269 hours and
22 some change listening to all of those tapes, but the cost --
23 just at the interpreter rates -- would be over almost \$11,000. 03:10

24 THE COURT: But you're making the assumption that an
25 interpreter is going to have to listen to all of those hours, 03:10

1 when you just pointed out a moment ago that there is -- most of
2 the conversations are not in Arabic; there is a word or two, or
3 perhaps a sentence or two here or there. So that's not really
4 necessary, then, for an interpreter to listen to all of the
5 hours of recorded conversations, is it?

03:10

6 MR. AARON: I believe actually there is passages in
7 which the confidential source is speaking to another person,
8 and they're sprinkled throughout the tapes. And yes, it's
9 possible if we edited the tapes and spent --

10 THE COURT: To put it simply, somebody in your
11 office, an attorney, presumably, but somebody in your office is
12 going to listen to all of that material.

03:11

13 MR. AARON: Yes, someone is listening. That's how we
14 know the information we know so far. Someone is listening.

15 THE COURT: So my point is that since large -- and if
16 this presumption is incorrect, but my presumption is that large
17 chunks of it would not need the assistance of an Arabic
18 interpreter; some parts will. But certainly, someone in your
19 office is listening to everything, and then you would be able
20 to determine which parts of it you need to get an interpreter
21 for.

03:11

22 It seems to me a faulty premise that just because
23 there are almost 300 hours of recordings that the interpreter
24 has to listen to all 300 hours.

25 MR. AARON: I suppose the interpreter could listen

03:11

1 and translate the Arabic out of context, but that might create
2 a different problem in that the conversation may be referring
3 to matters which are --

4 THE COURT: Well, I'm assuming that they are going to
5 listen to it within context. It's not going to be an isolated
6 word or an isolated sentence, but it's going to be some of the
7 material before and after to give it context. I still don't
8 think that amounts to listening to every single conversation.
9 If some of them were entirely in English, then I don't know why
10 the interpreter would need to listen to that.

03:12

11 MS. DEWITT: Your Honor, if I might?

12 I believe that the Court is exactly right. The
13 percentage that is in Arabic is an extremely small part of
14 these tapes, and most of those conversations are in fact
15 completely irrelevant when the confidential source simply is
16 taking a personal call, or something that's unrelated, and he
17 is unable to turn off the recording device. So the percentage
18 is very small. They're irrelevant. Obviously, the defense
19 counsel will need to make that assessment for themselves, but I
20 can say that it is my belief, based on my review of these
21 tapes, that it is a very, very, very small percentage of the
22 overall tapes.

03:12

23 The only exception to that is, is that sprinkled
24 throughout all of these tapes is the use of Islamic words. But
25 those are commonly used words by his client and others, and is

03:13

1 easily translatable. But other than those, the percentage
2 that's in Arabic is it is a very, very small portion of the
3 overall --

4 THE COURT: Well, the Indictment itself contains a
5 number of words, and the parties may dispute the translation,
6 of course, but, I mean, there is a lot of that in the
7 Indictment itself.

8 MS. DEWITT: And those are one type of technically
9 foreign language words. But other than that, the percentage is
10 a very small percentage that I believe is either completely or
11 largely irrelevant.

12 THE COURT: All right. Mr. Aaron, you can finish
13 your argument.

14 MR. AARON: So far, Your Honor, I have not needed the
15 assistance of an Arab language translator to read the
16 Indictment or the Complaint. I do understand --

17 THE COURT: Well, I did.

18 MR. AARON: I do understand --

19 THE COURT: I had to look up several of the words in
20 it.

21 MR. AARON: Several of those words I do understand,
22 but I'm talking about the conversations which he's having with
23 a third person, or maybe a fourth person even, who is not
24 present. We don't know what those conversations consist of.
25 The Government may say that they're irrelevant. The informant

03:13

03:13

03:14

03:14

1 may say they're irrelevant. But we would prefer to see for
2 ourselves.

3 THE COURT: Of course. But that doesn't -- and I
4 understand that, that you're not going to be likely to accept
5 the Government's representation that a conversation that the CS 03:14
6 was having was irrelevant, without getting it translated.

7 But the point, I think, that I'm still persuaded
8 about is that it's not, in terms of the amount of time that you
9 need, it's not necessarily going to be the case that you need
10 an interpreter to go through all of the almost 300 hours that 03:14
11 you have here.

12 MR. AARON: One of the reasons -- I was bringing this
13 up in terms of the argument for the witnesses. One of the
14 reasons why we needed the witnesses earlier rather than later
15 is so that we can do all the translations that might be 03:14
16 necessary.

17 Another reason is, as I mentioned before, the
18 Government may call someone who is a United States national who
19 is here living in Orange County, but to rebut that testimony,
20 or investigate it, we would have to conduct an interview of 03:15
21 someone in Afghanistan, which we have been trying to do but is
22 extremely difficult. We might need Afghani NATO, other foreign
23 nationals. We don't know whether -- we might need Americans
24 who are deployed. So that was very difficult. So we would
25 need to know who they are intending to call so that we can 03:15

1 investigate and call those people, if necessary.

2 So that's why we would like discovery sooner rather
3 than later. And that was one of the things that was mentioned
4 by --

5 THE COURT: But the Government's decision on what 03:15
6 witnesses to actually call at trial -- I understand there is
7 some unusual circumstances in this case, particularly the need
8 to do some investigation in Afghanistan, but it's unrealistic
9 to think that the Government is going to make a decision about
10 which witnesses to call three months or six months before 03:16
11 trial. And there is no obligation, as everyone knows -- it's
12 generally no obligation to give *Jencks* material until after the
13 witness has testified.

14 So, you know, I think we need to talk about -- my
15 intention is -- and this is what counsel should discuss with 03:16
16 respect to a trial date -- is a preliminary list of witnesses
17 that can be supplemented. But at least the defense would get a
18 number of the witnesses that the Government knows is going to
19 call at trial, at a reasonably early date before the pretrial
20 conference. 03:16

21 MR. AARON: I think that would be an excellent idea.

22 And I would note there is some witnesses we know are
23 going to be called -- we're almost certain they are going to be
24 called -- but we don't know who they are yet.

25 For example, my client was interrogated, I think, for 03:17

1 almost two weeks while he was in Afghanistan. We haven't had
2 reports of any of that. We don't know who those persons are.
3 We don't know if it was CIA, or military intelligence, or if
4 Afghan nationals were involved. But I'm almost certain that
5 the Government is going to use some of that material, and we
6 don't know who those persons are. 03:17

7 In terms of -- it kind of leads into my next point
8 regarding the motion for key documents and conversations. I
9 think really the gist of this argument here is that we wanted
10 the key conversations. We know that there is certain
11 conversations that the Government is going to use, but there
12 may be others out there within the 270 hours. 03:17

13 We have a lot of tapes. We have a lot of
14 conversations. The Government didn't identify the speakers on
15 the tapes, so we're scrambling, trying to figure out who the
16 speakers on the tapes are. We don't even know that, and that
17 makes it extremely difficult. 03:17

18 The Court, when it ruled -- or gave its tentative on
19 the Motion for the Discovery of the Confidential Source
20 Information said that we received data regarding payments. 03:18
21 That is correct, so far as it goes, but it's not dated; that
22 would be helpful for us in our cross-examination of the
23 informant. We have received information that the source has
24 received some \$250,000, I believe, over the last five years.
25 But we don't know -- I think we're entitled to a schedule of 03:18

1 payments. We are entitled to see what he was paid during the
2 pendency of this case and in other cases, as well. That's how
3 we would cross-examine him, based on his desire to get even
4 more money from the United States government by helping to
5 incriminate these young men.

03:18

6 The Court did want to hear arguments about the
7 unredacted discovery.

8 Basically, Your Honor, our view is that the
9 Government failed completely to comply with 26.2, which
10 requires them to claim a matter of privilege or relevant to the
11 Court so that the Court can inspect the material. There has
12 been none of that. For the Government to say, *Well, defense,*
13 *identify what you want to be redacted and why,* shifts the
14 burden to us when the burden is on the Government, according to
15 the Rule. They are the ones who have to say what is privilege
16 or what is irrelevant, and then the Court has to sustain that.

03:19

17 THE COURT: I mean, it's not a workable solution at
18 this point, at least I don't think it is, that I'm going to
19 review every page where there are redactions. So what I'm
20 concerned about is what is a -- I mean, there may well come a
21 point, and I've certainly done it in other cases, so I wouldn't
22 rule it out by any means -- that I am going to review some
23 documents with redactions and make a determination about a
24 privilege, but not -- I am a little troubled at this point
25 because there seems to me a possibility that the volume of

03:19

03:20

1 documents with extensive redactions is such that that's not a
2 workable solution.

3 So I think that, Ms. DeWitt, you should address that
4 issue. In particular, the issue that Mr. Aaron raises with
5 respect to the Government having the burden when it deletes
6 information claiming a privilege. 03:20

7 MS. DEWITT: Yes, Your Honor.

8 First, the problem is that many of the documents that
9 have been identified are not Rule 26 statements of a witness,
10 and in many instances we won't know whether they might arguably
11 be statements of a witness until we actually refine our witness
12 list. And that, in and of itself, will significantly reduce
13 the burden on the Court, in terms of reviewing potential areas
14 where we have some disagreement with counsel. 03:20

15 THE COURT: Maybe I'm confused. Let me ask you about
16 this a little bit more because maybe I'm confused. 03:21

17 The documents -- well, let's talk about categories of
18 the documents. That might be the easiest way to do it.

19 If you turn over a 302, or whatever the number is for
20 other agencies, of a witness statement, but it's not a witness
21 that you're going to -- that you're going to call to testify at
22 trial, what's your position about redactions in those
23 documents? 03:21

24 MS. DEWITT: That would not fall under Rule 26.2 as
25 to the witness about whom the statement is taken. It could 03:21

1 arguably be a witness statement for the agent taking the
2 statement.

3 THE COURT: Right. And you may call that agent.

4 MS. DEWITT: Right. So there's two different types
5 of categories where that may in fact become a statement. 03:21

6 I anticipate there will be very few agents called in
7 this case. There is an argument that even these would not fall
8 strictly under Rule 26.2 as to the -- for example, the
9 confidential source, because they are not under oath, they're
10 not verbatim, they're not adopted by him. They are reports by
11 the agent. But our policy is to produce them nevertheless. 03:22

12 I will add that there are some -- there is some
13 information in those reports that is redacted, for reasons that
14 we laid out in our opposition brief, including that they
15 include personal identifying information, cross-references to
16 pending investigations, or other classified information or law
17 enforcement sensitive information that can be -- but that are
18 not themselves actually the statement of that particular
19 witness. And that's where you get into an another gray area.

20 THE COURT: Well, you also get into the issue of why 03:23
21 the parties -- or the inability of the parties so far to enter
22 into a protective order. Because, for example, to the extent
23 that any of the documents that are being exchanged in
24 discovery, or turned over in this case in discovery, by the
25 Government, have, you know, references to personal -- when you 03:23

1 say personal identifying information, I take that as referring
2 to the kinds of information that the local rules require
3 counsel to redact, such as anything that would refer to a
4 personal phone number, an address, and so forth. So that
5 obviously should be redacted. The local rules require it.

03:23

6 MS. DEWITT: Yes.

7 THE COURT: It seems to me that there is some -- I
8 mean, that's, to me, such a simple question that, again, if the
9 parties had entered into a protective order, that the
10 Government would comply with the requirements to redact that
11 sort of information.

03:23

12 That would take care of that issue.

13 MS. DEWITT: We are sort of caught between the horns
14 of a dilemma, which is on the one side we are accused of
15 over-redacting, and on the other side we have to go back, in
16 some instances, and redact more. Whereas a protective order
17 might allow us to produce some of this information in a less
18 redacted form.

03:24

19 I will be very candid with Your Honor. We have
20 struggled very hard to try to come up with a protective order.
21 But we have on one side the position -- and we've met and
22 conferred and tried to work this out a number of times with
23 counsel, and the positions are -- defense counsel's position is
24 nothing is appropriate in this case for any -- no protective
25 order for anything.

03:24

1 And our position is that there is sensitive
2 information that has to be -- that has to be protected, for a
3 variety of reasons.

4 And keeping in mind the Court's order, we are trying
5 to figure out what an appropriate way is to carve this out. 03:25

6 THE COURT: Well, some things have to be redacted.
7 And personal identifying information has to be redacted. The
8 rules require it.

9 MR. AARON: Your Honor, if I can respond?

10 First, personal information needs to be redacted for 03:25
11 court filings.

12 Second, it is not correct to say that the defense did
13 not believe that a protective order would be inappropriate for
14 any information. I specifically remember discussing with
15 Ms. DeWitt, telling her that, yes, if there is a case in which
16 an agent is in the field or it's the identity of a CIA agent
17 who is undercover, or something like that, where there may be
18 harm to a person, yes, of course, we would believe that that
19 information should be protected and we would be willing to
20 enter into a protective order for that. But simply for 03:25
21 information regarding many of these things here, I cannot --

22 THE COURT: Counsel, I understand your point about
23 wanting to know a schedule of payments that have been made to
24 the CS, at least at some point. But information that may be
25 contained regarding other ongoing investigations that the CS is 03:26

1 involved in, I think I would agree with the Government that
2 information could be redacted.

3 It seems to me that there ought to be some common
4 ground here. And I'm disappointed that the parties have not
5 been able to at least resolve some of the differences regarding
6 a protective order, and then to the extent that differences
7 remain, I'll rule on them.

8 MR. AARON: Your Honor, it seems to me that the fact
9 that the informant, for example, is engaged in other
10 investigations, that should be admissible. That goes to the
11 degree of the informant's cooperation with the Government, his
12 motive in continuing to cooperate with them, and the
13 appropriateness of the financial remuneration that he receives.

14 The contents of those other investigations, that may
15 be protected or that may be irrelevant. But what the
16 Government has done here is has done a wholesale redactions
17 sometimes of complete pages and paragraphs. And that, I don't
18 think that they've really identified an appropriate reason for
19 doing that.

20 THE COURT: Ms. DeWitt.

21 MS. DEWITT: I think the Court is exactly right, that
22 other investigations do not need and are not appropriate to be
23 produced, for a whole variety of reasons, and that is a
24 significant part of what I believe he's referring to where
25 there has been those kinds of extensive redactions.

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1 We've already indicated, in a public unsealed filing,
2 that this source has been a source for the Government for more
3 than four-and-a-half years now, five -- approximately five
4 years. And it's clear, from what we've produced, when he
5 became involved in this investigation, and it's clear that
6 there is a period of time that preceded that. So it's clearly
7 within the defenses' knowledge that he's been involved in other
8 investigations. That's fair game for cross-examination. The
9 fact of those other investigations, the fact that he's been
10 paid, the amount of money that's he's been paid, is fair game.
11 We don't disagree with that.

03:27

03:28

12 And we've offered to sit down with counsel and
13 discuss individual documents that he has disagreements about
14 with respect to the redaction. There are some documents that
15 were produced very early on in this case that may have been
16 somewhat heavily redacted. We're the first to say that that
17 may have been the case because we were attempting to get
18 discovery out to counsel pre-Indictment, very, very early.

03:28

19 And we're happy to sit down and go over specific
20 documents, but I think in terms of the general categories,
21 we've explained to the Court why we've done it. We would like
22 to get to a point where we can resolve whatever other sort of
23 runoffs that we can with counsel, and then narrow down what are
24 truly witness statements and what are truly witnesses that are
25 going to be called so that any dispute that we have is a

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03:29

1 relatively small subset of a larger group of -- a larger set of
2 witness statements so that the Court isn't overburdened with
3 these things that we can't resolve.

4 THE COURT: All right. Well, it seems to me that the
5 upshot of what you've been discussing so far, with respect to 03:29
6 discovery that's has been turned over but it's redacted, is
7 that once some dates are set, including a date by which the
8 Government will give a preliminary list of its witnesses, then
9 the parties ought to be in a better position than you are in
10 right now to discuss what -- what the disputes really are 03:29
11 about, documents that have been, according to the defense,
12 over-redacted.

13 So I think what I'll do is set, in terms of
14 deadlines, is set a deadline -- well, require the parties to
15 meet and confer with respect to any particular documents that 03:30
16 the defense is claiming have been redacted beyond the proper
17 scope. And then that -- I think combined with setting some of
18 these other deadlines -- should narrow the scope of this
19 dispute.

20 MR. AARON: Your Honor, I appreciate the Court's 03:30
21 effort to kind of negotiate around a thorny area, but I think
22 the premises of the solution is questionable. Because what the
23 Government is saying is, basically, we want you, the defense,
24 to tell us why you think this should be unredacted.

25 I think the scope should be the Government should 03:30

1 tell us --

2 THE COURT: Let me interrupt you for a moment.

3 I think -- well, some material has already been
4 turned over with redactions. And then there is some material
5 that -- a great deal of material, as I understand it, will
6 still be coming.

03:31

7 MS. DEWITT: That's right, Your Honor.

8 THE COURT: So to the extent that the Government
9 redacts anything in the future, it needs to indicate, in
10 general terms, not line by line but let's say material in a
11 document, the basis to the defense at the time it produces it
12 for the redaction -- I mean the privilege that's being claimed
13 -- or not strictly speaking of privilege, the basis on which
14 the Government is withholding that information for the future.

03:31

15 Then, as to documents that have already been turned
16 over, I understand your point that it's not the defenses'
17 burden to -- it's initially, if it's covered under Rule 26.2 --
18 and not everything here is -- it is not the defendants' burden.

03:31

19 But in terms of meeting and conferring before a
20 motion is brought on particular documents or I'm asked to
21 review something in camera, the parties need to meet and
22 confer. And I don't think that shifts the burden.

03:32

23 Now, do you wish to be heard as to anything that's
24 the requirement that things be redacted in the future be
25 accompanied by an explanation for the basis for the redaction?

03:32

1 MS. DEWITT: There may be instances where that
2 information needs to be provided in terms of the category, Your
3 Honor, but, no, generally we have no problem with that.

4 THE COURT: All right. What other issues remain to
5 be discussed besides timing? 03:32

6 MR. AARON: The Court wanted to hear argument
7 regarding the discovery of information related to the arrest,
8 detention, and medical treatment in Afghanistan.

9 THE COURT: Go ahead.

10 MR. AARON: I think this information is important,
11 for a couple of reasons, not only to the facts surrounding the
12 arrest, detention, interrogation -- 03:32

13 THE COURT: Well, let's narrow it down.

14 First of all, I said given the explanation that you
15 had in your motion, and maybe it was in the reply, as well,
16 about why you wanted this information. I said it seemed to me
17 that medical records that the Government has should be turned
18 over. 03:33

19 Do you have any objection to that?

20 MS. DEWITT: I apologize, Your Honor. I was actually
21 flipping back to a question. 03:33

22 One concern I have about the redactions -- and I
23 apologize for the lost train of thought. One complication may
24 be that in instances where there may have been classified --
25 there may be classified information redacted from a document, 03:33

1 it would be inappropriate for us to note that in fact there
2 even is classified information that's being redacted.

3 So that's one complication that I can think of.

4 THE COURT: So what do you propose in that case? How
5 do you propose to identify, other than saying, *it's classified?* 03:33
6 I understand the issue there, but what do you propose?

7 MS. DEWITT: More generically describe it as
8 *sensitive information, sensitive law enforcement information.*
9 And if there is a dispute with counsel, then that may be
10 something that we have to take up. 03:34

11 THE COURT: I understand that when it comes to things
12 like that I may have to do an in camera review for those
13 purposes.

14 MS. DEWITT: And I'm sorry. You asked me a question,
15 and I apologize for not responding. 03:34

16 THE COURT: My question was, as to the documents that
17 the defense is seeking regarding the arrest and detention and
18 so forth of Mr. Aaron's client, Mr. Kabir, I said at the
19 outset, in describing my tentative ruling on this issue, that
20 the Government -- I'd be inclined to order the Government to 03:34
21 turn over any medical records that it has as to Mr. Kabir for
22 any treatment that he got while he was in detention at the time
23 of his arrest or after, if there are any.

24 MS. DEWITT: Any records that would have been after
25 his arrest -- just to be a little bit preciser, he was arrested 03:35

1 by the FBI. There are not -- I don't believe -- any records,
2 unless there was some notation by the medic on the plane about
3 him getting records, or anything that might be at the MDC.

4 So that's a different issue.

5 As to any medical records that may have been -- that 03:35
6 may exist when he was captured that would be in the possession
7 of an agency other than the Department of Justice, we can
8 certainly request those documents, Your Honor. And if there is
9 any problem with producing those documents, we will let the
10 Court know and let counsel know. 03:35

11 THE COURT: All right. So in the meantime, to the
12 extent you will investigate as to whether there are any
13 documents including simply notations or anything from a medic,
14 or anybody, as to any medical treatment provided at or after
15 the time of arrest before he was in BOP custody at the MDC? 03:36

16 MS. DEWITT: Yes.

17 THE COURT: All right. So that's one category.

18 Mr. Aaron.

19 MS. DEWITT: Mr. Aaron may be referring, actually, to
20 keep Mr. Kabir's medical records at CDC himself so we don't 03:36
21 have to --

22 THE COURT: Right. You may need to subpoena -- the
23 defense may need to subpoena them, to the extent that they are
24 in the custody of the Bureau of Prisons at MDC. You don't have
25 custody of those, so -- 03:36

1 MS. DEWITT: We can ask for them, as well, and I'm
2 happy to do that. I will confirm whether or not there is any
3 specific records that is from FBI taking custody and arresting
4 forward, and then we'll make efforts to find out what the
5 status is of anything before that.

03:36

6 THE COURT: Before that. All right.

7 Mr. Aaron.

8 MR. AARON: Three things. Our view is different.

9 An arrest is the seizure of the person when he was
10 seized and beaten and detained by United States forces in
11 Afghanistan. We view that as arrest. He received medical
12 treatment before, during, and after his interrogations, and we
13 want details of all of that. All of that bears upon the
14 voluntariness and his comprehension of the interrogation
15 process.

03:36

03:37

16 Secondly, Your Honor, the problem with the discovery
17 orders -- the protective order -- is that the Government has
18 come up with a new form of evidence called, *sensitive but not*
19 *classified*. I do not know what that means. I understand the
20 other statutes dealing with protected information, national
21 security, and that sort of thing.

03:37

22 THE COURT: Let's not talk about the protective order
23 for the moment. Let's focus on -- let's not go backwards.
24 Let's try to focus on this issue.

25 MR. AARON: Right.

03:37

1 THE COURT: What you're arguing is that you want
2 materials about your client's medical treatment, et cetera,
3 before the FBI took custody of him?

4 MR. AARON: Yes.

5 THE COURT: But as I heard, as I understood what 03:37
6 Ms. DeWitt said a moment ago, she said the Government would
7 make -- would investigate and make efforts to find those
8 records.

9 Am I right?

10 MS. DEWITT: To find them and to ask for approval -- 03:38
11 ask for permission to provide them in discovery. Yes, Your
12 Honor, we will make those efforts.

13 THE COURT: All right.

14 MR. AARON: And I think this was something we had
15 requested in our discovery letter and informally, as well. 03:38

16 And if I might, Your Honor, I know the Court doesn't
17 want to go back, and I understand that the Court -- well,
18 perhaps I'm misstating, but I think I understand the Court is
19 imposing on counsel in this case a meet-and-confer requirement
20 before there is further discovery motions. 03:38

21 THE COURT: Yes.

22 MR. AARON: That's fine. But I would like the Court
23 to know that we not only submitted a discovery request in a
24 formal letter, but we had sent discovery e-mails with specific
25 supplemental requests. And one of the reasons I filed the 03:38

1 motions, as I told --

2 THE COURT: We don't need to rehash that. I know you
3 attached those letters and those e-mail communications to the
4 motion. I'm not -- I don't want to focus on criticism of any
5 past behavior of either side or both sides. I really want to
6 move forward and try to come up with ways that discovery can
7 flow more smoothly in the future.

03:39

8 MR. AARON: Yes. Well, the Court is going to order
9 them to provide records of the medical treatment, and they are
10 going to provide that. That's fine. If I could get those
11 within, say, the next -- if the Government could tell me at its
12 earliest convenience when they expect to have those records,
13 that would be helpful. Because one of the problems we've had,
14 in dealing with the Government, is we will ask them for items
15 and they say, *Well, discovery is continuing and we are getting*
16 *it to you as quickly as we can.*

03:39

03:39

17 And we say, *Do you have any idea when we might have*
18 *that information?*

19 And they say, *No.*

20 So just to have an idea would help.

03:39

21 THE COURT: Well, as far as the documents that the
22 Government is going to have to try to get from Afghanistan
23 before the FBI arrested -- I understand the distinction you're
24 making about when he was first detained and then an arrest,
25 let's call it that -- do you even know what agencies you would

03:40

1 be seeking those from? Agencies or --

2 MS. DEWITT: Department of Defense, Your Honor, and
3 we'll move as expeditiously as we can. I will set up a call
4 with them later this week.

5 THE COURT: All right. So that would, I think, take 03:40
6 care of the medical records.

7 MR. AARON: There was one more area that the Court
8 was going to entertain an argument, and that was on discovery
9 of the expert witness information.

10 We have talked to a number of expert witnesses 03:40
11 because we know, generally speaking, we have an idea from our
12 review of past cases in which the Government has prosecuted
13 similar charges, what types of experts they generally use. For
14 example, in at least 26 terrorism and material support cases
15 the Government has called Evan Kohlmann as an expert, and 03:40
16 defense lawyers have called experts to rebut him. If we know
17 for sure they are not going to be calling this person, then
18 that --

19 THE COURT: Or an expert in such a category.

20 MR. AARON: Right. That would actually help the 03:41
21 defense because then we would not need to spend time and money
22 trying to counter that expert.

23 That's one of the reasons.

24 The other reason is that not only are these experts 03:41
25 expensive, but they are very busy. So experts on Islamic

1 fundamentalism in Afghanistan, national security issues, things
2 like that, they are difficult to find. They are expensive.

3 So the more discovery we have of what the Government
4 is going to do, the faster we can provide discovery of what
5 we're going to do.

03:41

6 THE COURT: All right. I think the only thing to be
7 said in response to that is, what is a reasonable time for
8 initial disclosures by the Government of its experts? I mean,
9 to the extent the Government knows now its not going to call,
10 or it is going to call, any particular expert, I hope the
11 Government will in fact make that disclosure as soon as
12 possible.

03:42

13 But in any event, I am going to set a deadline today
14 for disclosures for both sides on experts.

15 So let's move to that. I'm sorry just a moment.

03:42

16 MR. AARON: Your Honor, if the Court is finished with
17 the discovery motions, may I have just a moment?

18 THE COURT: Certainly.

19 MR. AARON: Thank you, Your Honor.

20 I just wanted to reemphasize again we are not just
21 asking for the medical records. We were asking for everything
22 in the motion, all the reports. And I understand the Court is
23 going to consider that when making --

03:44

24 THE COURT: Well, but I am just looking at it to see
25 what the other -- well, the motion said documents regarding the

03:44

1 circumstances of the arrest. That's overbroad because I'm just
2 not clear what that means. But to the extent that you're
3 seeking documents regarding any medical treatment, or anything
4 with respect to the injuries that you allege that he sustained,
5 I think that's covered in my ruling.

03:45

6 MR. AARON: Right. In the discovery motion, we put
7 it, *all evidence, reports about Kabir's arrest, detention, and*
8 *medical treatment -- I deleted the and -- and medical treatment*
9 *in Afghanistan and transfer to the US.*

10 THE COURT: Well, to say all documents regarding the
11 circumstances, his arrest, detention, that's overbroad.

03:45

12 MR. AARON: Well, we don't have anything. So any --
13 if we just had any documents, that would be a better position
14 than we are in now. So to deny it wholesale and not give us --

15 THE COURT: Well, I'm not denying it wholesale
16 because I'm saying that I certainly see the basis that you've
17 delineated for the medical records. Because the basis for the
18 request, in general, is that you claim that your client was, in
19 your words, *severely beaten, and his injuries influenced his*
20 *ability to understand his rights to knowingly waive them and to*
21 *communicate with Government agents.*

03:45

03:46

22 So I think the medical records would be the records
23 that would bear on those issues.

24 MR. AARON: Well, the Government maintained that he
25 tried to resist arrest. So obviously, there is discrepancy in

03:46

1 the factual narratives of how he --

2 THE COURT: I understand that. And to the extent
3 there is an issue as to how he sustained injuries, that's not
4 relevant for the purposes of this case.

5 If your client later brings a Bivens action, that's a 03:46
6 different issue. I mean, how the injuries were sustained -- I
7 mean, whether it's the Government's version or yours, what's
8 really the issue, as far as this case goes, is did he sustain
9 injuries? What's the extent of them? And what's their effect
10 on his ability to communicate, and so forth? 03:47

11 MR. AARON: I understand the Court's position, but I
12 do think it is important how he sustained the injuries.

13 For example, just one quick hypothetical.

14 If the Government's United States forces say,
15 *Mr. Kabir, you're under arrest, for whatever, and he says,* 03:47
16 *Okay, and he submits, and they immediately hit him with a rifle*
17 *butt and knock him unconscious or inflict other injuries, it's*
18 *going to have an effect on how he responds to an interrogation.*

19 If, on the other hand, he engaged, as the Government
20 claims, in mutual combat with the special forces soldier, that 03:47
21 also might have an effect on how he would respond in his
22 interrogation.

23 But clearly, if someone is just beaten without cause,
24 that will cause them --

25 THE COURT: Well, your client was -- that's not 03:47

1 information that's -- your allegations regarding, if you make
2 them later on, any statements made by your clients at certain
3 points are not admissible, for the reasons related to what
4 you've just described as a hypothetical, that would be the
5 subject of a motion to suppress, I'm sure. And the basis for
6 it would be the testi -- I mean, your client's declaration as
7 to mistreatment he received that effected the voluntariness of
8 the statements, that's the context on which I see that being
9 relevant and being the subject of a motion to suppress.

03:48

10 MR. AARON: That's true. But what if there was --
11 and we don't know what evidence is out there. What if the
12 special forces soldier say, *Yes, when we arrested him, we did*
13 *beat him. That's our custom, is to subdue so there is no*
14 *possibility of resisting arrest?*

03:48

15 Their interest is not in complying with the terms --
16 Rules of Criminal Procedure or *Miranda*. Their interest is in
17 apprehending someone who they think is engaging in material
18 support of terror. So those types of reports may actually
19 support Mr. Kabir's argument.

03:48

20 THE COURT: I'm not sure I -- I'm not sure I follow
21 your logic there, but -- I mean, we could debate endlessly the
22 number of possible scenarios regarding your client's detention
23 and arrest.

03:49

24 If you bring a motion regarding the voluntariness of
25 the statements made, the Government will have to respond to it.

03:49

1 And I don't think I can decide in a vacuum, or in advance, what
2 material might be relevant to those issues, other than what
3 I've already stated about the medical records.

4 MR. AARON: And, of course, we would need to have the
5 actual evidence of the statements, which I understand -- which
6 I would assume that since that is part of the rules of Rule 16
7 and Rule 26.2 discovery, that the Court would expect the
8 Government to provide that as well. Because so far, we don't
9 have any information as to what he supposedly told law
10 enforcement or the military or special forces during that
11 period of time. 03:49

12 THE COURT: Well, to the extent that the Government
13 isn't going to use any of those statements during its
14 case-in-chief or during trial, for that matter, what's your
15 position on that? 03:50

16 MS. DEWITT: Are you talking about the statements of
17 his post-arrest, post-detention, Your Honor?

18 THE COURT: Both.

19 MS. DEWITT: It's not the Government's intention to
20 use, in its case-in-chief, statements made by Mr. Kabir when he
21 was in Afghanistan prior to being taken into custody by the
22 FBI. 03:50

23 MR. AARON: I think we are entitled to those
24 regardless of whether or not the Government is intending to use
25 them under Rule 16. It's important for the defense to have 03:51

1 those statements because if he were to decide to testify at
2 trial we would have to know what, if anything, the Government
3 would intend to impeach him with.

4 THE COURT: Ms. DeWitt.

5 MS. DEWITT: I think that the Court -- the Court's 03:51
6 analysis at the start of this hearing, Your Honor, is exactly
7 correct, that medical records, to the extent that they could
8 arguably relate to the defendant's ability to communicate,
9 there may be some appropriate discovery in that regard. The
10 Government is prepared to or will shortly produce Mr. Kabir's 03:51
11 post-arrest 302. And I think the Court is -- counsel is sort
12 of turning this argument on its head by saying we have to have
13 the statements to know whether they were voluntary before we
14 can challenge that they are voluntary. And I don't think
15 that's a correct analysis. 03:52

16 The Court is exactly right. If he wants to challenge
17 any voluntariness of any statements that the Government intends
18 to use at trial, that the Government would have to respond to
19 that, and would respond to that, or lose the motion if it did
20 not. And to the extent that the Government has any other 03:52
21 *Brady, Giglio,* or other -- *Brady* or other arguable discovery
22 obligations, the Government will discuss those issues as it
23 can.

24 THE COURT: Well, Rule 16(a)(1)(A) is limited to
25 statements that the Government intends to use at trial. 03:52

1 MR. AARON: I thought the Government had to provide
2 all statements from the defendant.

3 THE COURT: Well, I'm telling you that 16(a) (1) (A)
4 says, *Upon request, the Government must disclose the substance*
5 *of any relevant oral statement made by the defendant before* 03:53
6 *over after arrest in response to interrogation by a person the*
7 *defendant knew was a government agent if the government intends*
8 *to use the statement at trial.*

9 And then subsection (B) says, again, *Upon request,*
10 *must disclose and make available for inspection, et cetera, any* 03:53
11 *relevant written or recorded statements by the defendant if:*

12 *The statement is within the government's control; and*
13 *The attorney for the government knew, or with*
14 *reasonable diligence would have known that the statement*
15 *exists.* 03:53

16 The first part of the Rule clearly only applies to
17 statements that the Government intends to use at trial.

18 Subsection (B) does not limit itself to statements
19 that the Government is going to use at trial. But I guess it
20 seems to me perhaps not an issue, but perhaps an issue, is in 03:54
21 this case if the statement is within the government's
22 possession, custody, or control, if it's the Department of
23 Defense, that's still the government. So those would have to
24 be turned over at some point.

25 MS. DEWITT: Your Honor, it's the Government's 03:54

1 position that those would only be subject to discovery if they
2 are -- if they contained *Brady* information.

3 THE COURT: Well, that's not the clear language of
4 the Rule.

5 MS. DEWITT: Your Honor, to -- I think to fully 03:56
6 address this issue will require some further briefing to the
7 Court. But I think that the key -- the key issue here is, is
8 whether it's in the Government's possession, custody and
9 control, whether it is in fact relevant, and whether it's
10 relevant and helpful to the defense. 03:56

11 To the extent that it is not relevant and helpful to
12 the defense, it is our position, under case law, that it is not
13 -- that we have no discovery obligations with respect to the
14 statements that may be in control of the Department of Defense.

15 THE COURT: All right. Well, then as to that, my -- 03:57
16 in terms of medical records, I've already made the position
17 clear about that.

18 In terms of other statements, if there is, in the
19 course of your investigation with respect to your discovery
20 obligations, if you find there are such statements and you're 03:57
21 going to take the position that they do not need to be turned
22 over -- they are not covered under Rule 16 subsection
23 (a) (1) (B), then you can move the Court accordingly.

24 MS. DEWITT: We will do that.

25 THE COURT: All right. 03:57

1 MR. AARON: Your Honor, the last issue that I had is
2 we had briefly talked about this, and I don't remember the
3 Court making any ruling on it. And if so, if the Court did, I
4 apologize. But one of the problems we have regarding the 270
5 hours of various conversations on the 63 DVDs is that we do not
6 know the speakers of the conversations.

03:57

7 If the Government could simply identify the speakers
8 to the conversations, we can identify our client's voice. He
9 doesn't appear on those conversations. We can identify the
10 informant, but we can't identify the other speakers.

03:58

11 THE COURT: Well, that goes -- I think that goes back
12 to the issue of transcripts to be provided if the Government --
13 first of all, if the Government intends to use any of the
14 recordings, or whether they are video or audio, the audio
15 portion of any recordings, then I'm going to set a deadline for
16 transcripts.

03:58

17 That leaves open the question of whether the
18 Government should be ordered to -- if it's not using a
19 particular -- if it doesn't intend to use anything in a
20 particular recording, should it be required to identify the
21 speakers?

03:58

22 Ms. DeWitt.

23 MS. DEWITT: A couple of things on that, Your Honor.

24 First of all, in addition to the audio, the

25 Government has provided some transcripts already. It has

03:58

1 provided many summaries of those conversations, which
2 themselves identify the speakers, and/or many of these
3 conversations the defendants or themselves are participants,
4 obviously, and they clearly can identify the speakers who they
5 were speaking to.

03:59

6 So this is a little bit of, I think, a false issue.

7 And, yes, it does require, at least in some -- to
8 some extent marrying up the summary or the transcript with the
9 actual audiotape. In some instances they are even -- you can
10 see who is speaking.

03:59

11 THE COURT: To the extent there is a video recording?

12 MS. DEWITT: Right. So there is a little bit of a --
13 there's a mix and match here. Some of them you can tell from
14 watching the videos. Some of them you can tell because it's
15 obvious to anybody, if you watch a couple of them, whose voice
16 is who. Even I can recognize some of the voices from listening
17 to them, many of the voices. Some of them do have summaries
18 that clearly identify who is a participant in that
19 conversation, and then you can figure out from that who they
20 are.

03:59

04:00

21 With respect to transcripts, yes, the Government
22 wants to and is working on preparing transcripts, would like to
23 be able to use transcripts for anything it plays to the jury,
24 would like to be able to provide for anything that it intends
25 to use at trial: a transcript to counsel and the Court and to

04:00

1 the jury.

2 So that's something that we are working on and fully
3 intend to do.

4 It is not, however, very feasible to transcribe every
5 single minute of hundreds and hundreds of hours of tapes. So
6 we're trying to identify -- 04:00

7 THE COURT: Well, and I'm not going to require that.

8 MS. DEWITT: Thank you.

9 We're trying to prioritize those and provide those to
10 counsel, and we will do so as quickly as we can. And some of
11 those are already in progress, and some of them have already
12 even been provided. 04:00

13 MR. AARON: Your Honor, this is exactly what the
14 cases that we cited in our briefs, the voluminous cases where
15 the Government dumps a bunch of undigested, uncategorized
16 discovery on the defense, where the judges talked about the
17 unfairness of this. 04:01

18 They talk about paraphrases to the conversations.

19 Where are they? Are we supposed to hunt through these
20 thousands of pages, carefully pick out the paraphrases, then
21 listen to all 270 hours and come up with which ones match, when
22 the Government can simply tell us? 04:01

23 Are we supposed to identify the participants that
24 I've never heard speaking? I haven't heard Mr. DeLeon,
25 Mr. Gojali, or Mr. Santana speaking. 04:01

1 THE COURT: I think the Government -- Government
2 counsel's suggestion, in terms of what's really here, is that
3 there is a number of video recordings, and if those are watched
4 -- even a few, not all, but even a few -- it would be from that
5 that Government -- excuse me, that defense counsel could
6 determine who the speakers are on things that are not on video.
7 That's the first thing.

04:01

8 But I think that given that, and given the amount of
9 information here, the solution for this issue is a deadline for
10 the Government to produce the transcripts of the parts of the
11 tapes, or any of the recordings, that the Government intends to
12 use at trial.

04:02

13 I understand that the defenses' position is going to
14 be that there is other material that the Government wouldn't
15 use at trial and it needs -- that doesn't mean it's only going
16 to review what the Government is going to use. But I'm not
17 persuaded that it's necessary for the Government -- necessary
18 or possible for the Government at this point to give sort of a
19 glossary of every speaker on every portion of what's been
20 produced.

04:02

21 So let's move to the trial date.

22 I could set the matter for trial in early February,
23 which I guess is everyone's -- I could set it in January. I
24 have -- well, I only have civil matters that are set for trial
25 in January, so this case would take precedence. But I could

04:03

1 set it for -- I have some civil cases set in February too, but
2 I could set it for trial on February the 3rd. Is that the
3 trial date or the --

4 THE CLERK: The 4th.

5 THE COURT: It would be February the 4th. 04:03

6 So that's what I'm inclined to do, and very
7 reluctantly. But the parties should view this -- just so it's
8 as clear as possible -- that this is the trial date. And I'm
9 unlikely to entertain seriously any -- without really a showing
10 that something completely unanticipated and that couldn't have
11 been anticipated has occurred, to change that date again. 04:04

12 If we set it for trial on February the 4th, and I'd
13 set the pretrial conference or January the 13th. I'm also
14 going to set a separate deadline in this case, to the extent it
15 may be necessary, for the hearing of any Daubert motions, which
16 would be ahead of that date. 04:04

17 So with a trial date of January the 4th -- excuse me,
18 February the 4th, a pretrial conference date of January 13th.
19 And at the pretrial conference, I would hear motions -- they
20 could always be filed earlier, but that would be the last date
21 for hearing any motions with respect to 404(b) evidence,
22 motions, other motions in limine, and just to be clear, any
23 motions with respect to any evidentiary issues, other than
24 motions addressed to the issues raised in *Kumho Tire* and
25 Daubert, those should be heard, filed timely to be heard no 04:05

1 later than December 16th.

2 MR. AARON: I'm sorry, Your Honor, I got confused.

3 I thought the motions re 404(b) motions in limine and
4 evidentiary issues should be 1/13/13.

5 THE COURT: Correct -- '14.

04:06

6 MR. AARON: 1/13/14, I beg your pardon. And then the
7 next date is in December for which motions?

8 THE COURT: Motions under *Daubert* or *Kumho Tire*,
9 motions regarding expert witnesses.

10 MR. AARON: And that's December?

04:06

11 THE COURT: 16th. Those are the last days for
12 hearing. You can always file your motions earlier, but those
13 are the last days. Motions should be filed three weeks
14 beforehand; the opposition a week later; the reply the next
15 week.

04:06

16 MR. AARON: The Court's standing order says four
17 weeks.

18 THE COURT: Oh, I'm sorry. That would be four weeks,
19 that's right, in order to get the reply in. I apologize. So
20 28 days.

04:06

21 All right. The deadline for witness lists. The
22 Government should file its preliminary witness list, or file it
23 and, of course, disclose to defense, by early September. I'm
24 thinking about September the 9th. The Government is allowed to
25 supplement that. But the witness lists, both sides -- well,

04:07

1 just the Government at this point should -- may file its
2 supplements on a rolling basis as you learn of other witnesses
3 you're going to call at trial. Of course, other than rebuttal
4 witnesses, disclose to the defense by the date of the pretrial
5 or -- by the date of the pretrial conference, I would get final
6 witness lists from both sides or from all sides. 04:08

7 With respect to the defense, of course, that means
8 experts -- and I'll get into the deadlines for experts. The
9 defense may not know, you know, who its witnesses are, but to
10 the extent that the defendant -- any of the defendants -- know
11 of other witnesses that they are going to call, those should be
12 disclosed at the time of the pretrial conference. 04:08

13 The Government's designation for expert witnesses --
14 I'm going to suggest, unless someone convinces me otherwise --
15 October 21st. And the defense -- well, let's make that October
16 the 7th. I'm sorry. The defense designation of experts by
17 October the 28th. And when I say "designation," that means the
18 information that's required under Rule 16 in terms of summary
19 of testimony, and so forth. 04:09

20 Now, for transcripts, the Government -- I think the
21 -- again, the Government, as it prepares transcripts for
22 anything that it intends to use at trial, should turn those
23 over as soon as they're available. But I would expect that the
24 bulk of those transcripts would be turned over at the time that
25 the Government -- by September the 9th. And then if there are 04:10

1 additional transcripts that are going to be used at trial, no
2 later than January the 6th.

3 Exhibit lists. The Government's preliminary exhibit
4 list to be served and filed by December the 2nd. And then the
5 final exhibit list should be disclosed by January the 6th.

04:11

6 That's a week before the pretrial conference date. There is
7 always one or two exhibits -- well, I hope there won't be more
8 than one or two -- that one side or the other, either the day
9 of the pretrial conference or after the pretrial conference,
10 wishes to add or delete. And for good cause shown, I would
11 allow that as to adding. I never require much if you're going
12 to delete exhibits.

04:11

13 The information with respect to any confidential
14 source, I mean, that would come with the -- I think that just
15 comes within the witness designation dates that I've already
16 set.

04:12

17 MR. AARON: And that would include cooperating
18 witnesses as well?

19 THE COURT: To the extent the Government knows who
20 its going to call at trial by the dates I've set, yes.

04:12

21 And the last time you were here the Government -- I
22 don't know that it's really changed much -- the Government gave
23 a time estimate. I think it was 20 court days.

24 Do you have anything to add on that point?

25 MS. DEWITT: At this time, Your Honor, I think that

04:12

1 that is still a solid estimate for the trial date.

2 Can I ask for one clarification?

3 THE COURT: Certainly.

4 MS. DEWITT: On the witness list, is it sufficient
5 for the Court, with respect to custodian of records where we
6 may not know exactly who Sprint is going to send, or whatever,
7 that we can just list "Sprint" as custodian of record?

8 THE COURT: Yes, absolutely. I would hope, when it
9 comes down to trial, we won't have to put any custodians on the
10 witness stand. If I have to revisit that at the pretrial
11 conference, I will. But unless there is really a debate about
12 something being authenticated, this trial is going to be long
13 enough. It's going to be hard enough to pick a jury as it is,
14 without making it longer.

15 But that brings up the last question I wanted to
16 discuss with counsel, and that is a questionnaire for a jury.

17 What I've been thinking of so far, to try to keep the
18 expense to the Court and the resources of both sides -- well,
19 just to contain those -- it seems to me that we might want to
20 send out a couple of questionnaires in this case. The first
21 one would be just a simple time qualifying questionnaire. I've
22 done this -- and I'm sure both sides have had lots of
23 experience with questionnaires, but it seems to me that the
24 last thing we want to do is to call in the hundreds of people
25 that we might need to call in to get a jury of, you know, a

04:13

04:13

04:13

04:14

04:14

1 jury of 12 and the correct number of alternates -- the
2 appropriate number of alternates -- is to bring them into the
3 courthouse and then for the first time find out who can serve
4 on a four- or five- or six-week trial. So it only is the cost
5 of postage, which still is pretty high, for the kind of jury
6 pool we'd be looking at here. But to first send out a
7 questionnaire that simply says the trial date -- for a criminal
8 case, we have a trial date set for February the 6th. Are you
9 available to serve on a trial that's estimated to last X number
10 of days? And also tell them that we wouldn't be in session on
11 Mondays, so that people have a pretty clear understanding of
12 what's involved.

04:14

13 And if you aren't, then explain why not.

14 And then once those responses come in, we can go
15 through some time qualifying, see which of the responses that
16 counsel are willing to stipulate to or that I would grant a
17 hardship for.

04:15

18 Then of the group that we have the hardship -- we've
19 selected, at least preliminary out of hardship, we could send
20 another questionnaire again before they come into the
21 courthouse, with a few, ten or less questions, that are
22 directed to the substance of the case. That way, when the jury
23 -- again, the purpose of that would be there might be some
24 prospective jurors that all counsel would stipulate based on
25 their responses to the second questionnaire, and they wouldn't

04:16

04:16

1 even need to come to the courthouse.

2 As to others where, whatever the responses are, that
3 would give counsel the opportunity to, during voir dire, refine
4 what their questions are going to be of a particular juror.

5 And when I say "ten or less questions," that's really 04:16
6 what I mean. I think what I envision for the second
7 questionnaire is not even the name of the case, because we
8 don't want to allow jurors to go and collect information, but
9 just a brief agreed-upon description of the nature of the
10 charges and a few other questions that would relate to jurors' 04:17
11 ability to, you know, carry out their duties, to apply the
12 presumption of innocence, to listen to all the testimony,
13 whether they have -- if you want to include some questions
14 about if they've lived in certain parts of the world, that
15 might be appropriate. But counsel should give some thought to 04:17
16 that. Because in order to do this properly, we need to send
17 out the questionnaires quite a bit of time ahead of the trial
18 date, especially if we're going to do it in two steps, like I'm
19 proposing.

20 First of all, does anyone have any objection to 04:17
21 sending out a time qualifying questionnaire?

22 MR. AARON: Speaking for Kabir, I do not.

23 I just wanted to clarify the estimate given by
24 Ms. DeWitt of 20 court days, that's for the Government's
25 case-in-chief? 04:18

1 THE COURT: I believe so.

2 MS. DEWITT: Yes, Your Honor.

3 THE COURT: So we're going to be intending to tell
4 the jury -- well, 20 court days is five weeks. So we would be
5 telling prospective jurors -- and maybe this will be refined by
6 the time we get around to sending this questionnaire out -- but
7 we would be telling prospective jurors probably seven to eight
8 weeks.

04:18

9 MR. AARON: Yes.

10 THE COURT: Does anybody have any objection to, first
11 of all, sending out a time qualifying questionnaire?

04:18

12 MR. SCOTT: No, Your Honor.

13 MR. DRIGGS: No.

14 THE COURT: We would probably need to send that out
15 in November. So I will circulate or file -- apprise counsel of
16 what I would intend to do in terms of notifying prospective
17 jurors. Very little about the case, just the length of time
18 and, you know, what, if they think they have an extraordinary
19 hardship. And you can comment, object, et cetera.

04:18

20 Then out of that pool, counsel will have a chance,
21 when you get the responses in, to look at the responses, unless
22 you decide that you -- we're going to have to send out
23 thousands of these.

04:19

24 So when I've done this in the past, sometimes counsel
25 have -- you would get to see them but would have no objection

04:19

1 to the Court making the time qualifying decisions. But you may
2 or may not want to do that once you have taken a look at what
3 the responses are.

4 Once we sorted through the questionnaires, in terms
5 of time responses, then we would send probably -- if we send 04:19
6 them out in November, we give people two weeks, and I think now
7 by that time this division is going to be part of a pilot
8 project in this district to have online responses, so some
9 people may be able to respond online. So that would speed
10 things up. But allowing a month for that, then by December we 04:20
11 should send out the second questionnaire.

12 So counsel should meet and confer about the contents
13 of the second questionnaire and a deadline for submitting
14 either an agreed-upon one, which doesn't mean that I'm -- I've
15 seen some agreed-upon ones in other cases that were sent out 04:20
16 that were far too long. The fewer questions you ask, the
17 higher the quality of the response is going to be. If you ask
18 ten questions, you're going to get better responses than if you
19 have seven pages. By the time you get to page 6, you're going
20 to get "yes" or "no." 04:21

21 So ten questions or so. And that should be submitted
22 -- either an agreed-upon one or both sides' versions, which I
23 hope would not have many disputed areas -- no later than
24 October 28th.

25 MS. DEWITT: May I inquire, Your Honor? 04:21

1 When you say "time qualify," are you saying to
2 strictly limit it to your ability to serve this amount of time?

3 THE COURT: Right.

4 MS. DEWITT: And I agree with you that the less
5 questions you ask in a substantive one the better because you 04:21
6 get better answers, but is it your practice, or is your
7 preference to include some hardship-type questions that are not
8 time related in that, as well? Or to wait until they come in?

9 THE COURT: Well, I'm not sure what you mean by
10 hardship questions. 04:21

11 MS. DEWITT: Inability to hear, understand, or, you
12 know --

13 THE COURT: That's on the summons that they get. The
14 questions about, Can you understand, comprehend English? Do
15 you have a hearing disability? All of those things are covered 04:22
16 on the summons that they get.

17 MS. DEWITT: My experience is it's not necessarily --

18 THE COURT: Well, my experience is the same.
19 Sometimes you get people in the courtroom and it's not until
20 you're about to swear them in that they decide they have either
21 a disability or are not fluent in English. 04:22

22 MS. DEWITT: Somebody who can't sit that long because
23 they have a back problem, or something like that, is that
24 something --

25 THE COURT: Oh, that's something that goes in the 04:22

1 time qualifying. Is there any reason why you cannot sit on a
2 trial for this length? That would include someone who says, I
3 can't -- I have to use the restroom every 15 minutes.

4 It's not strictly time qualifying in that sense.

5 Because if the question is, Would you be able to serve on a 04:22
6 jury of this -- a jury trial that lasts this long, you're going
7 to get a lot of answers.

8 MS. DEWITT: Understood.

9 THE COURT: But it's not substantive questions about 04:23
10 -- because they won't know anything about the case. They're
11 just going to know the length of the trial.

12 Any other questions about that process?

13 Anything else that any side wants to bring up at this
14 time?

15 MR. AARON: Yes, Your Honor. I have two issues. 04:23

16 One, I would make my pitch for having the expert
17 witness disclosure for the Government be the same as for the
18 witness list, in part because those witnesses the Government
19 would know perhaps even earlier than the regular witness list,
20 and the amount of work that the defense needs to do for those 04:23
21 witnesses is going to be greater. And the types of persons
22 that we're dealing with, in terms of trying to get them as
23 experts -- people who are experts on national security, area
24 study, Islamic culture, or Arabic, that sort of thing -- they
25 do tend to get booked up way in advance. So the more time -- 04:23

1 THE COURT: Ms. DeWitt, do you have any objection to
2 that?

3 MS. DEWITT: I'm sorry. I want to make sure I
4 understand the exact dates and how they interrelate.

5 THE COURT: Right now I set October the 7th and 04:24
6 October the 28th for the plaintiff's and defendants'
7 disclosures on experts.

8 And, Mr. Aaron, you're asking to move that up to
9 early September?

10 MR. AARON: Yes, 9/9, the same as the regular witness 04:24
11 list.

12 MS. DEWITT: Well, Your Honor, my preference would be
13 to not have them on the same day so that the Government could
14 make sure that that list is as complete and final as possible,
15 and to allow us the time to focus on experts thereafter. 04:24

16 If we know that we're going to retain an expert,
17 we'll certainly give them discovery when their report is ready,
18 or anything, if we have it earlier than that. But there may be
19 some things that --

20 THE COURT: Well, I think the defense is correct on 04:25
21 this issue, so I'm going to state September the 9th is the
22 Government's designation date. And then three weeks after
23 that, which would be September the 30th, for the defenses'
24 designation date -- the disclosure date, I should say.

25 MR. AARON: Thank you, Your Honor. 04:25

1 MS. DEWITT: And I assume, Your Honor, that we would,
2 for good cause, be able to supplement or if it's --

3 THE COURT: Well, either side could for good cause.

4 MS. DEWITT: And in response to his designations, as
5 well? 04:25

6 THE COURT: Yes. You can respond to his designations
7 if there would be a rebuttal. Both sides have to do that.

8 MS. DEWITT: Thank you, Your Honor.

9 THE COURT: Mr. Aaron, anything else?

10 MR. AARON: Yes, Your Honor. 04:25

11 Mr. Larsen is prepared to address the issue of the
12 protective order which has caused so much difficulty in this
13 case.

14 MR. LARSEN: Not so much address, Your Honor, just
15 seek some clarification. 04:26

16 Originally, the Government proposed an order -- a
17 blanket order -- to cover all of the discovery in this case and
18 treat it as confidential. Your Honor rejected that order and
19 said if the Government has items they want to seal or protect,
20 it should come forward and show cause of why they should be
21 made confidential. 04:26

22 And so we're just seeking clarification now as to the
23 status of the discovery that's been produced to date -- and
24 will be produced in the future -- as to whether it's subject to
25 any kind of order or whether it will be subject on a 04:26

1 document-by-document basis.

2 THE COURT: I would hope it would be at least
3 category by category and not page by page. But the parties do
4 need to -- it seems to me that the parties ought to be able to
5 agree. And if you can't agree, then submit your -- the
6 Government can submit a proposed protective order, and you can
7 submit your objections to it. But there ought to be a process
8 that you can agree upon for certain categories of documents or
9 -- well, at least certain -- this kind of goes to the redaction
10 issue -- certain categories of information. If you can't agree
11 on it, then I'll, you know, review things in camera.

04:26

12 MR. LARSEN: I think we certainly agree, as Mr. Aaron
13 said earlier, that we would have no objection to something
14 that, for example, imperils an ongoing investigation. I think
15 the problem is that the Government hasn't identified to us
16 what, if anything, in the discovery fits that bill.

04:27

17 THE COURT: Well, I'm not sure that anything -- I
18 don't know because I haven't seen the discovery. But I'm not
19 sure the Government has turned over anything like that to this
20 extent. I mean, unless you're talking about things that have
21 been redacted.

04:27

22 But if the parties -- for example, I think you've
23 gotten the strong hint from me that the Government has to
24 redact personal identifying information. So that should be the
25 subject of the protective order.

04:27

1 Information regarding ongoing investigations and
2 unrelated cases, that is going -- I mean, there's a motion --
3 well, I think you can see where I'm going to go with that.

4 So to the extent that you have common ground, at
5 least come up with a protective order that agrees on as much as 04:28
6 you can. And then to the extent there are objections, I will
7 rule on them.

8 MR. LARSEN: And would the Court like to set a date
9 for a submission of a proposed order on that?

10 THE COURT: You want to go outside this afternoon 04:28
11 until you agree -- and meet and confer until, you know -- I
12 could be here until midnight.

13 MS. DEWITT: We've made diligent efforts to meet and
14 confer, Your Honor, and we will do so again.

15 THE COURT: All right. The deadline for a protective 04:28
16 order to be submitted -- that was intended to be humorous, but
17 I guess -- well, only semi because I would be here, but I'm not
18 going to order people to stay until you've -- at this point,
19 I'm not going to do that.

20 So I would want to see a protective order -- either 04:28
21 stipulated or to the extent there are any objections to certain
22 parts of it -- by May 20th. That should give you plenty of
23 time. That's three weeks from today.

24 MS. DEWITT: Your Honor, just for the record because
25 there is some apparent confusion, which I don't really 04:29

1 understand, counsel for Mr. Kabir, and the other counsel, had
2 actually entered into stipulations with us regarding a
3 protective order. I understand that the Court has taken a
4 position that that stipulation itself may be somewhat
5 overbroad.

04:29

6 THE COURT: Yes.

7 MS. DEWITT: But it is our position that the Court's
8 order does not in any way undo that stipulation until and
9 unless another order is entered by the Court. Because that's
10 the premise that we're operating on, is that until we can get a
11 court order that this stipulation is bound, that we're bound by
12 this, or that the parties can reach a new stipulation, that the
13 parties will be bound by the previously --

04:29

14 THE COURT: If the parties have previously entered
15 into an agreement, that's the agreement, but depending on the
16 terms of that agreement and the scope of it.

04:30

17 MR. LARSEN: Just to clarify for the record, Your
18 Honor, we made clear to counsel for the Government we withdrew
19 our stipulation long ago.

20 In good faith, however, we have been observing the
21 terms of the proposed, yet rejected, protective order, and
22 that's why we're now seeking clarification.

04:30

23 THE COURT: Well, as to Mr. Kabir only, then, on this
24 point, because I haven't, you know, in response to the
25 Government's application for entry of the protective order,

04:30

1 there was no opposition to that from other counsel. But as to
2 Mr. Kabir, I'm trying to recall exactly when you notified the
3 Government that you were no longer in a position to stipulate.
4 When was that?

5 MR. LARSEN: It was through e-mail. I think we first 04:30
6 said it's been clear that we've withdrawn our consent and for
7 no other reason we're now opposing this order which you
8 described as even less restrictive, but now for the record we
9 are withdrawing our consent. And that was via e-mail.

10 THE COURT: But when, roughly? 04:31

11 MR. LARSEN: It would have been -- it would have been
12 after the filing of our opposition to the proposed protective
13 order.

14 THE COURT: No. I think it was before that, wasn't
15 it? 04:31

16 MR. LARSEN: I think we had made clear in
17 discussions, but if there was a formal, you know, if the
18 Government was asking us, Well, you agreed initially, you know,
19 to a protective order --

20 THE COURT: And I've ruled. You're right. I ruled 04:31
21 that you were allowed to withdraw that. But as to the other
22 defendants, that remains in place because they haven't objected
23 or sought to withdraw.

24 MS. DEWITT: My only point, Your Honor, just to be
25 clear, is that the order -- the stipulation that the parties 04:31

1 have agreed to, we produced discovery with the understanding
2 that that would be abided by. We asked counsel to either abide
3 by that or give us the discovery back until we can get that
4 resolved.

5 THE COURT: So you're just asking about the 04:32
6 previously disclosed matters, not anything in the future. I
7 understand.

8 MS. DEWITT: Right.

9 THE COURT: Now I understand.

10 MS. DEWITT: And we've also asked every time -- we've 04:32
11 actually produced significant amounts and made available
12 significant additional amounts since this supposed withdrawal
13 of the stipulation, and we have asked them to abide by the
14 stipulation.

15 THE COURT: And Mr. Larsen has indicated they have 04:32
16 agreed to do that. So that covers everything that has been
17 produced so far?

18 MS. DEWITT: Yes.

19 THE COURT: Yes. I think everybody is in agreement 04:32
20 on that, yes.

21 MS. DEWITT: Thank you.

22 THE COURT: All right. I think that clarified it, I
23 hope.

24 MR. LARSEN: Yes.

25 THE COURT: Any other counsel wish to be heard on any 04:32

1 matters?

2 Mr. Driggs or Mr. Scott?

3 MR. DRIGGS: No, Your Honor.

4 MR. SCOTT: No, Your Honor.

5 THE COURT: You'll get a written order with all of
6 these dates, of course. Thank you very much. 04:32

7 MR. AARON: Thank you, Your Honor.

8 THE COURT: And you'll get a written order on all the
9 motions too. And please return your copies of the tentative
10 ruling to the clerk. 04:33

11 (Proceedings Concluded)

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24 C E R T I F I C A T E

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1 DOCKET NO. EDCR 12-92 (A) VAP

2
3 I hereby certify that pursuant to Section 753,
4 Title 28, United States Code, the foregoing is a true and
5 accurate transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the regulations
of the Judicial Conference of the United States.

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9 /S/ Phyllis A. Preston DATED: February 21, 2014

10 Federal Official Court Reporter

11 CSR, FCRR

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